

earnings of \$675.53 per week as a medical clerk fairly and reasonably represented her wage-earning capacity as of November 3, 2002.

The record indicates that appellant filed claims for compensation (Form CA-7) for intermittent dates following the wage-earning capacity decision. The compensation payment records indicate that direct payments were made for intermittent dates of total disability. On November 21, 2007 appellant filed a Form CA-7 for compensation from October 5, 2000 to “current,” stating “pay retention” and “1/2 raises.” The portion of the form to be completed by the employing establishment states, “employee believes she is entitled to wage loss for her decrease in annual cost of living as a result of pay retention.”

Appellant also filed CA-7 forms for the following periods: January 30 to February 1, 2008, February 4 to 15, 2008, February 18 to 29, 2008 and March 3 to 14, 2008. On March 17, 2008 she filed a notice of recurrence of disability (Form CA-2a), identifying the date of recurrence as January 28, 2008.

In a report dated January 18, 2008, Dr. William Stewart, a psychiatrist, stated that appellant described a stressful work situation as she had been asked to float between various departments, but was hopeful of a more stable job assignment. He diagnosed chronic lumbar pain syndrome from the work-related injury on October 5, 2000, chronic depression and anxiety and chronic pain syndrome with psychological features. In a report dated February 1, 2008, Dr. Stewart stated that appellant felt anxious and frustrated. He noted that she had been treated at a hospital emergency room and released. Dr. Stewart stated that inpatient admission for evaluation and possible detoxification of medications was appropriate. The record also contains a note dated February 11, 2008 from a physician whose signature is illegible, stating appellant was “unable to work until approximately [March 5, 2008] due to injury [October 5, 2000].” A February 28, 2008 note from the same physician stated that appellant could return to work on March 3, 2008.

In an April 30, 2008 decision, the Office denied the claim for a recurrence of disability as of January 28, 2008. A second April 30, 2008 decision denied 3.25 hours of leave from September 8 to October 4, 2006. As noted the Board set aside these decisions and remanded the case for further development.

On June 27, 2008 the Office received a January 30, 2008 report from Dr. Eugene Kenny regarding emergency room treatment on that date. Dr. Kenny stated that appellant had been on chronic pain medications and decided she wanted to “get off of them.” He diagnosed weakness and possible medication reaction.

By decision dated June 22, 2009, the Office denied modification of the wage-earning capacity determination. It found appellant was not entitled to compensation for the claimed periods in 2008. With respect to the claim for compensation from October 5, 2000 to November 2007, the Office stated that appellant had been properly receiving compensation based on her wage-earning capacity determination and appropriate Consumer Price Index increases.

Appellant requested reconsideration and submitted a report dated July 7, 2009 from Dr. Theresa Pardoe, an osteopath, who stated that appellant was hospitalized on January 28, 2008 as her weight was down and she was not able to care for herself. Dr. Pardoe advised that appellant had been doing better and had been weaned from her prior pain medications. She further stated, “I would just ask you to reconsider your coverage for compensation benefits for this recurrence of January 28, 2008 due to the patient’s very frail health, very low body weight, as well as use of narcotic and antianxiety medications.”

By decision dated August 18, 2009, the Office reviewed the case on its merits and denied modification of the June 22, 2009 decision.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

ANALYSIS

The Office issued a wage-earning capacity determination on May 5, 2003, finding that appellant’s actual earnings as a medical clerk since November 3, 1992 represented her wage-earning capacity. With respect to her claim for a recurrence of disability and claims for compensation from January 28 to March 14, 2008, the initial question is whether the wage-earning capacity determination should be modified.⁴ It is appellant’s burden of proof to establish a material change in the accepted employment-related condition.

The record reflects that the accepted injuries are mild concussion, anxiety disorder, left sciatica of the lumbar spine, left knee sprain, ankle sprain, lumbar sprain and chronic pain.⁵ Appellant received treatment on February 1, 2008 from Dr. Stewart, but he did not describe a material change in the nature and extent of any employment-related condition. Dr. Stewart stated that appellant felt anxious and an inpatient admission for possible detoxification from medications was appropriate, without providing additional detail. Appellant was also treated at an emergency room on January 30, 2008, but the physician offered no opinion on the issue presented. A brief note dated February 11, 2008 stated that appellant was unable to work due to an October 5, 2000 injury. Without a proper factual and medical background or medical

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ The decision stated that all but lumbar sprain and chronic pain were “resolved,” but the record does not contain any final decisions regarding termination of an accepted condition.

rationale to support a material change in any accepted condition, this note is of little probative value.⁶

Appellant also submitted a July 7, 2009 report from Dr. Pardoe, who referred to a recurrence of January 28, 2008 and appellant's frail health. The issue is whether there was a material change in the nature and extent of an employment-related condition and Dr. Pardoe did not provide a rationalized medical opinion on the issue.

The Board notes that even if the evidence does not warrant a modification of the wage-earning capacity determination, it may not preclude consideration of temporary total disability for brief periods based on a recurrence of disability.⁷ The medical evidence must, however, establish a recurrence of disability for specific periods. For the reasons noted above, the medical evidence is of diminished probative value.

Appellant filed a claim for compensation covering the period from the date of injury through November 2007, referring to "pay retention" and "1/2 raises." She did not provide additional explanation. It appears that appellant is referring to her position as medical clerk commencing November 3, 2002, and she seeks compensation on the grounds that her retained pay position earns less than her date-of-injury position. It is well established that a claimant is not entitled to compensation for wage-loss based on loss of step increases or cost-of-living increases in a retained pay position. As the Board explained in *Donald R. Johnson*,⁸ a wage-earning capacity is based on actual earnings at a specific time and is compared to the date-of-injury position at that time. In this case, that would be November 3, 2002. Even if over time there is an increasing disparity between the actual earnings and the date-of-injury position, there is no increase in loss of wage-earning capacity and no basis to modify a wage-earning capacity decision.

On appeal, appellant resubmitted the July 7, 2009 report from Dr. Pardoe and other evidence of record. The Board has considered the relevant evidence and, for the reasons stated, finds that appellant did not establish that modification of the wage-earning capacity determination was warranted.

CONCLUSION

The Board finds appellant did not establish that a modification of the May 5, 2003 wage-earning capacity decision was warranted.

⁶ Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the opinion. *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁷ *Katherine T. Kreger*, *supra* note 4. A claimant working a light-duty position must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements. *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ 48 ECAB 453 (1997). *See also Domenick Pezzetti*, 45 ECAB 787 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 18 and June 22, 2009 are affirmed.

Issued: June 17, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board